NO. 19628

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HELEN MAXINE LEVI TRAVIS,

Appellant and Petitioner,

vs.

UNITED STATES OF AMERICA,

Appellee.

PETITION FOR REHEARING
BY APPELLANT

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA,
CENTRAL DIVISION

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To The Honorable United States Court of Appeals for the Ninth Circuit, and To The Honorable Stanley N. Barnes, M. Oliver Koelsch and Charles L. Powell, Judges Sitting in the Instant Cause:

Appellant Helen Maxine Levi Travis respectfully petitions the Court to grant a rehearing in the within cause from the judgment on appeal rendered and filed on November 19, 1962, upon the grounds and for all of the considerations stated below:

(1) In disallowing Appellant's contention that the Excluding Cuba regulation was by its express promulgation clause promulgated only under Section 211a (22 U. S. C. Sec. 211a, Act

of July 3, 1926), a statute which does not impose criminal penalty for violation of regulations issued under its authority, and not under Section 1185 (8 U. S. C. Sec. 1185), a statute which does impose criminal penalty for violation of regulations issued under its authority, the Court observed only,

> "The 'Excluding Cuba' regulation is an amendment and as originally promulgated 22 CFR 53.1-53.9 made specific reference to 8 U. S. C. Sec. 1185."
> (Slip Op., 3, emphasis added.)

But the circumstance that the original regulations of 22 CFR 53.1-53.9 were issued and promulgated under the authority and with the criminal sanction of Section 1185 [1/] does not reach, affect or cure the circumstance that the Excluding Cuba amendment was not issued under such authority but only under authority of Section 211a, carrying no power of criminal sanction.

The issue is important and narrow and is a question of authorizing power. The authority of administrative officers to enact regulations with the force of criminal sanctions must be grounded in an authorizing statute; it is an awesome power and is strictly circumscribed. Accordingly, even to amend originally criminal regulations so that the amendment or change will also bear criminal

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1/ Actually they were issued under the predecessor statutes of Section 1185, the Act of May 22, 1918, 40 Stat. 559, as amended by the Act of June 21, 1941, 55 Stat. 252, as was expressly recited in their promulgation clause, 6 Fed. Reg. 6069. See Appellant's Opening Brief, pp. 33-34. They were adopted under Section 1185 by incorporation by reference in Presidential Proclamation No. 3004, January 17, 1953, 67 Stat. C31, par. 1.

force, the amendment must itself be duly issued under the authorization and authority of a statute providing criminal penalty for violation of regulations issued under it. Section 211a, under the authority of which alone the Excluding Cuba regulation was expressly issued, possesses and transmits no such authorizing power. Hence violation of that regulation can be no crime.

(2) In disallowing Appellant's void for vagueness contentions the Court's opinion (Slip Op., p. 3) states,

> "A reading of the statute and the regulations demonstrates the plain and unambiguous meaning to be that a person is subject to criminal penalties on leaving the United States for Cuba without a valid passport. That Appellant knew this is agreed in the stipulation." (Emphasis added.)

But the stipulation was only that Appellant "knew the provisions of Section 1185(b) of Title 8, United States Code, and Sections 53.2 and 53.3 of Title 22, Code of Federal Regulations." (Transcript of Record, p. 65, lines 24-26.) This does not stipulate to the meaning or effect of the statute or regulation now claimed by the Court, and the suggestion of "stipulation" as to statutory and regulatory meaning and effect has obscured and left unconsidered the serious claim by Appellant that the command of the statute and regulation is void for vagueness and contradiction.

All of the prior restrictions issued by the Department sounded only in a civil safe-passage-withdrawal terms and were issued

under the authority of Section 211a bearing no criminal sanction, and respecting such restrictions the Department repeatedly disclaimed that they imposed prohibition on travel under criminal law. These facts tell the citizen that travel to the proscribed areas is not regarded as a crime. To prosecute thereafter turns this contrived structure of administrative regulations into a trap even for the wary. Considering the foregoing facts in light of the legislative history of Section 1185 indicating no suggestion of intent to authorize criminal-sanction area travel bans and the repeated unsuccessful recent attempts by the Executive since Section 1185 to obtain from Congress a statutory amendment authorizing criminal area limitations, and considering, finally, the climaxing circumstance that the Excluding Cuba regulation was expressly promulgated under Section 211a (bearing no criminal sanction) and not under Section 1185, with criminal penalties, it appears difficult to deny that Appellant, or any other citizen, might reasonably read the Excluding Cuba regulation in the light of all of these circumstances as communicating no criminal-sanction area travel prohibition. (Appellant's Supplemental Brief, pp.12-15.) Petitioner was misled. She did not reach the wrong interpretation of the regulatory maze. Rather the Government reversed its field by professing to impose no criminal sanctions and after reliance thereon doing the very opposite.

Appellant respectfully urges the Constitutional fundamental that a statute or regulation bearing criminal sanction may not be vague, contradictory or misleading in its command. Commands so characterized are void for want of due process. (Raley v. Ohio,

360 U. S. 423, 438; Johnson v. United States, 318 U. S. 189, 197; Cox v. Louisiana, ___ U. S. ___, 13 L. Ed. 2d 487, 496; United States v. Cardiff, 344 U. S. 174, 176.) A citizen may not be convicted of crime until he is made to know by Government that his act is criminally prohibited; without such awareness his state of mind lacks punishable scienter. (Morissette v. United States, 342 U. S. 246; Lambert v. California, 355 U. S. 225; Smith v. California, 361 U. S. 147, 150-151.) "Elementary fairness" requires that a defendant "be not misled", but be "clearly apprised" by the law of any criminal command. (Johnson v. United States, supra, 318 U. S. 189, 197; Quinn v. United States, 349 U. S. 155, 166.)

WHEREFORE, upon all of the reasons and considerations above stated Appellant respectfully prays that a rehearing be allowed in the within cause.

Respectfully submitted,

A. L. WIRIN

JOHN T. McTERNAN

By /s/ John T. McTernan
JOHN T. McTERNAN

WILLIAM B. MURRISH
Of Counsel

Attorneys for Appellant and Petitioner

CERTIFICATE

I certify that in my judgment the foregoing Petition for Rehearing is well founded and is not interposed for delay.

I further certify that, in connection with the preparation of said Petition, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the said foregoing Petition is in full compliance with those rules.

/s/ John T. McTernan

JOHN T. McTERNAN